

Office - Supreme Court, U.S.
FILED
SEP 7 1983
ALEXANDER L. STEVAS.
CLERK

NO. 82-2132

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WARREN K. LEWELLEN, ET AL., APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF OPPOSING SOLICITOR GENERAL'S
MOTION TO DISMISS

WARREN K. LEWELLEN, PRO SE

PAULA K. LEWELLEN, PRO SE

145 Davis Road
Bedford, Massachusetts 01730

(617) 275-7784

NO. 82-2132

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WARREN K. LEWELLEN, ET AL., APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF OPPOSING SOLICITOR GENERAL'S
MOTION TO DISMISS

WARREN K. LEWELLEN, PRO SE

PAULA K. LEWELLEN, PRO SE

145 Davis Road
Bedford, Massachusetts 01730

(617) 275-7784

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 82-2132

WARREN K. LEWELLEN, ET AL., APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF OPPOSING SOLICITOR GENERAL'S
MOTION TO DISMISS

TABLE OF CONTENTS

	<u>PAGE</u>
1. FARM LOSSES	1
2. CAPITAL GAINS TREATMENT	2
3. LATE FILING OF 1970 AND 1971	
NOTICES OF DEFICIENCY	3
a) STIPULATION NO. 3	3
b) EXHIBITS TO THE TAX COURT ...	3
c) CAUSE OF DELINQUENCIES	4
4. MATTERS CONSIDERED INSUBSTANTIAL	
BY SOLICITOR GENERAL	5
5. REASON OF NO CONTEST OF I.R.S.	
ERRONEOUS CLAIMS	6
6. PRAYER THAT THE SOLICITOR GENERAL'S	
MOTION TO DISMISS BE DENIED	7
7. AFFIDAVIT OF SERVICE	8

FARM LOSSES

The Solicitor General asserts in his paragraph 2 that appellants in 29 years "never generated a profit" which is true, "only substantial losses" which is untrue. Our tax problems were handled in 1963 to 1969 by a Tax Consultant who changed our accounting to eliminate the losses in at least some of those years. Unfortunately he did not return our records and he died so we have no details. Presently the farm makes a small profit largely because we sell our produce at retail instead of wholesale. Unlike "nine-to-five" people who work for wage or salary, farmers work mostly from "dawn-to-dusk" with no salary other than profit from the farm and when losses are sustained I.R.S. wants to tax them. We believe this to be wrong.

CAPITAL GAINS TREATMENT

In an effort to obtain farm profits appellants purchased a large farm in New Hampshire and in accordance with our notification to I.R.S. was paying for it by selling land from the Bedford farm as houselots. Later I.R.S. claimed the lots were held primarily for sale to customers in the ordinary course of a trade or business and denied us capital gains treatment. We believe this to be wrong. Furthermore, in our view, if the lot income was from ordinary trade or business -- and our trade was farming, then that income should be applied to reduce farm losses.

LATE FILING OF 1970-1971

NOTICES OF DEFICIENCY

In paragraph 3 the Solicitor General asserts "There is nothing in the record, however, to establish that the notices in question were not timely filed."

We point out that the record does show indirectly that the three (3) year period of Section 6501 of the 1954 Code had elapsed before the I.R.S. audits began in 1975. We know of no I.R.S. action on 1970 and 1971 before the audits of 1972, 3, 4 and 5 were started.

a) Stipulation No. 3 to the Tax Court says "The petitioners gave to Revenue Agent Scully their 1972, 1973 and 1975 Federal Income Tax Returns on December 2, 1975, May 25, 1976 and September 24, 1976 respectively.

b) Copies of the returns for 1970-75 inclusive were included as exhibits to the Tax Court. Agent Scully

LATE FILING OF 1970-1971

NOTICES OF DEFICIENCY

In paragraph 3 the Solicitor General asserts "There is nothing in the record, however, to establish that the notices in questions were not timely filed."

We point out that the record does show indirectly that the three (3) year period of Section 6501 of the 1954 Code had elapsed before the I.R.S. audits began in 1975. We know of no I.R.S. action on 1970 and 1971 before the audits of 1972, 3, 4 and 5 were started.

a) Stipulation No. 3 to the Tax Court says "The petitioners gave to Revenue ^{Agent} Scully their 1972, 1973 and 1975 Federal Income Tax Return on December 2, 1975, May 25, 1976 and September 24, 1976, respectively.

b) Copies of the returns for 1970-75 inclusive were included as exhibits to the Tax Court. Agent Scully

had written on the face of the 1972, 1973 and 1975 returns the words "original delinquent" "secured by audit" and on the 1974 return the words "reintroduced into work flow". There were no notations on the 1970 and 1971 returns (indicating that they were not then in contention).

c) The cause of the delinquencies is indicated in Stipulation No. 6 which says "on January 4, 1973 a barn and its contents were destroyed by fire". The three (3) large barns and a silo were interconnected and within eighty (80') feet of the house which was downwind hence severely threatened with fire and water damage. Other damage was caused by well meaning friends and neighbors who "saved" our house belongings thoroughly scattering and losing some of our records. While cleaning up the debris Mr. Lewellen turned a tractor over upon himself and almost died of spinal column injuries. The fire, our

son's kidney failure and his paralysis,
Mrs. Lewellen's cancer and Mr. Lewellen's
spinal injury pushed I.R.S. accounts out
of mind.

MATTERS CONSIDERED INSUBSTANTIAL
BY SOLICITOR GENERAL

The matters considered insubstantial
by the Director in his paragraph 3 add up
to more than \$100,000 which is a very sub-
stantial amount to the appellants
especially when interest and penalties of
as much as 26% per year are added and are
likely to bankrupt a family farm.

REASON FOR NO CONTEST OF
I.R.S. ERRONEOUS CLAIMS

The reason that the appellants did not contest the I.R.S. claims, other than "farm losses" and "capital gains" in the Tax Court was that such I.R.S. claims and errors were unknown to the appellants before their appearance before the Tax Court Judge. Furthermore, we had confidence in our government's honesty. The I.R.S. attorney presented the judge a memorandum entitled "Memorandum of Authorities" passing us a copy. We had no opportunity to read or study the I.R.S. memorandum which we thought was a listing of the results of other cases. Actually the "Memorandum of Authorities" included many baseless assertions, half truths and untruths. We endeavored to contest some of the claims before the Appeals Court but all attention seemed to be directed to the "farm losses" and "capital gains" questions.

Therefore, in our appeal to the Supreme Court we are limiting our contest to the claims other than the "farm losses" and the "capital gains" with the hope that these very costly erroneous claims will be considered by the Supreme Court.

PRAYER THAT THE SOLICITOR GENERAL'S
MOTION TO DISMISS BE DENIED

It is therefore respectfully submitted that the Motion to Dismiss be denied. We believe that to disregard our appeal would result in a miscarriage of justice.

Warren K. Lewellen
Warren K. Lewellen, pro se

Paula K. Lewellen
Paula K. Lewellen, pro se

145 Davis Road
Bedford, Massachusetts 01730
(617) 275-7784

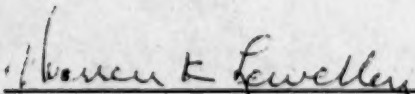
AFFIDAVIT OF SERVICE

I, WARREN K. LEWELLEN, pro se, hereby certify that I have served three (3) copies of the within Brief in Opposition to the Solicitor General's Motion to Dismiss Case No. 82-2132, postage prepaid, upon both the following:

1. Rex E. Lee, Solicitor General
Department of Justice
Washington, D.C. 20530
2. Michael L. Paup, Chief
Appellate Division
Attorney General's Office
Washington, D.C. 20530

Dated:

8-20-83


Warren K. Lewellen, pro se
145 Davis Road
Bedford, Massachusetts 01730
(617) 275-7784